Petition

Supreme Court, U.S.
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81-1936

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

VICTOR G. APODACA, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER A JUROR WHO ADMITS THAT SHE WOULD TEND TO FAVOR THE GOVERNMENT IN A CLOSE CASE AND NEVER STATES THAT SHE COULD BE IMPARTIAL OR THAT SHE COULD SET HER BIAS ASIDE SHOULD BE EXCUSED FOR CAUSE.

II. WHETHER THE COURT OF APPEALS IMPROPERLY CONSIDERED THE FACT THAT THE FBI AGENTS DID NOT ACTUALLY TESTIFY WHEN SUCH FACT OCCURRED AFTER THE PETITIONER WAS FORCED TO EXHAUST HIS PEREMPTORY CHALLENGES.

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, VICTOR G. APODACA, JR., Appellant in the court below, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above case on February 4, 1982. That decision

affirmed the conviction and judgment entered by the United States District Court for the Western District of Texas, El Paso Division.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit from which Victor G. Apodaca, Jr., now petitions for certiorari is reported as *United States v. Apodaca*, 666 F.2d 89 (5th Cir. 1982), and is reproduced herein as Appendix "A". The Order of the United States Court of Appeals for the Fifth Circuit in *United States v. Apodaca*, No. 81-1096 (5th Cir. February 17, 1982), denying rehearing is not yet published, but is reproduced herein as Appendix "B".

JURISDICTION

The Judgment of the Court of Appeals affirming the conviction of Petitioner was entered on January 4, 1982. A timely Petition for Rehearing was filed by Petitioner and denied by the Court of Appeals on February 17, 1982. This Petition is timely filed within sixty (60) days of the denial of rehearing under the *Supreme Court Rules*, Rule 22. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULES OF CRIMINAL PROCEDURE INVOLVED

1. In pertinent part, *United States Constitution*, Article III, Section 2, Paragraph 3 provides:

> The trial of all crimes, except in cases of impeachments, shall be by jury. . . .

2. In pertinent part, *United States Constitution*, Amendment VI provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . .

3. In pertinent part, *Federal Rules of Criminal Procedure*, Rule 24(b) provides:

> If the offense charged is punishable by imprisonment for more than one year, . . . the defendant or defendants jointly [are entitled] to 10 peremptory challenges.

STATEMENT OF THE CASE

Prior to his trial in United States District Court, the Petitioner evidenced a strong concern about the jury who would hear his case, filing a *Motion for [Individual] Voir Dire* and a *Motion to Sequester Jury* (RII 84 et seq.),[1] both of which were denied by the District Court. During the Court's voir dire, Mrs. Jean Eberle raised her hand in answer to the Court's question about exposure to publicity about the case.[2] Although Juror Eberle declared that she "could probably set it aside because [her] memory was not that good" (RVIII 112–119), she

---

[1] The *Motion to Voir Dire* and attached *Exhibits* are listed in the docket sheet as "Document 14"; however, because of the size and volume of the newspaper clippings about the case, they were placed in a special envelope marked "14".

[2] The complete voir dire examination of Juror Eberle is reproduced herein as Appendix "C".

voluntarily admitted another problem that she would have with the case:

> THE COURT: *You mentioned your husband's career, so I might as well ask you about it now.*
>
> MRS. EBERLE: Yes.
>
> THE COURT: *Would that prevent you from being fair and impartial in this case?*
>
> MRS. EBERLE: I have thought about it a great deal, Your Honor. I am very proud of the 30 years he spent in the Bureau. I was also employed. I know the kind of investigation and the kind of work which is involved before any case is taken into a grand jury.
>
> I try to think of myself as being unbiased, but I will have to say this: If I were to hear evidence, which, all things being equal, had my brain in a whirl, I am very human, and I possibly might, knowing the work involved and the background of legal cases like this, I might be human enough to give a little more credence to the prosecution. I am just being honest with you.

(Emphasis supplied) (RVIII 114–115). Later in the examination, Juror Eberle stated that she had not yet made up her mind about the case (RVIII 114) and that she would not resent cross-examination of a FBI witness (RVIII 115–116). Juror Eberle also answered:

> MR. BURGESS: Well, I guess I'll have to ask you the hardest question that a defense lawyer ever has to ask a juror. If you were sitting where Mr. Apodaca is sitting, would you want a person in your frame of mind to pass judgment on your guilt or innocence?
>
> MRS. EBERLE: At this moment, I really do not believe there is anything wrong with my state of mind. I have tried to answer your questions as

> honestly as I can. I am an FBI wife. My husband has not been active for 11 years; he is retired.

(RVIII 116). Subsequently, the prosecutor in the case represented to the Court that he intended to call at least one FBI agent as a government witness (RVIII 118–119).[3] The Trial Court at first deferred its ruling (RVIII 119), but later overruled the Petitioner's challenge for cause forcing him to exercise a peremptory challenge. The Petitioner was subsequently tried on a ten-count indictment charging tax offenses under 26 U.S.C. § 7201 and 26 U.S.C. § 7206. The jury found the Appellant guilty of Counts I to VI, and not guilty of Counts VII, VIII, and IX (RIII 594). Count X was dismissed before trial (RII 279). The Appellant was sentenced to the following:

> *Count 1:* Three years' imprisonment under 18 U.S.C. § 4205(b)(2) and a fine of $10,000 imposed.
>
> *Count 2:* Three years' imprisonment under 18 U.S.C. § 4205(b)(2) to be served concurrently with that imposed in Count 1 above, and a fine of $10,000 imposed.
>
> *Count 3:* Three years' imprisonment under 18 U.S.C. § 4205(b)(2) to be served consecutively to that imposed in Count 1 above, and a fine of $10,000 imposed, execution of sentence of imprisonment being suspended, and Defendant placed on probation with supervision for a period of five years pursuant to the provisions of Conditions of Probation entered by the Court in December 1973.
>
> *Count 4:* Three years' imprisonment under 18 U.S.C. § 4205(b)(2) to be served concurrently with Count 1 above.

---

[3] This witness was not called at trial after the defense exercised a peremptory challenge against Juror Eberle.

Count 5: Three years' imprisonment under 18 U.S.C. § 4205(b)(2) to be served concurrently with Counts 1 and 4 above.

Count 6: Three years' imprisonment under 18 U.S.C. § 4205(b)(2) to be served concurrently with that imposed in Counts 1 and 4 above.

(RIII 661). On appeal to the United States Court of Appeals for the Fifth Circuit, the Petitioner argued that Juror Eberle should have been excused for cause, and that the Trial Court's failure to grant the challenge for cause deprived the defense of a peremptory challenge, *Brief for Appellant,* at pp. 31-33, 36-39. The Petitioner also pointed out that he had to accept two jurors who were unacceptable to him because of a lack of peremptory challenges.

(1) *T. H. Williams.* Juror Williams knew several witnesses (8/188). Juror Williams had had prior criminal jury service in a murder case where he found the Defendant guilty (RII 318). Juror Williams had been audited by the IRS and was "quite happy" afterwards. Williams was also exposed to pre-trial publicity about the case (RII 101-102).

(2) *Alfonso Landin.* Juror Landin had an accounting background (RII 387). He had had prior juror service in a criminal case (RII 389). Juror Landin had also been audited by the IRS (RII 390). In that audit he had to pay more taxes (RVIII 219). Juror Landin had also been exposed to publicity about the case (8/217-218).

Had the defense not been forced to utilize two peremptory challenges on jurors Eberle and Stonecipher, the defense would have utilized these two challenges to strike jurors Williams and Landin who were unacceptable to

the defense for the reasons stated above.[4] Also, the Petitioner pointed out to the Court that potential Juror Attell who identified with the Appellant because he was related to the Appellant "distantly" by marriage and was a "friend" was excused for cause by the Court on motion of the government (RVIII 67-69). Also potential Juror Garcia (RVIII 56-57) and potential Juror Escandon (RVIII 78-79) were excused for cause because of similar reasons on motion of the government.

In deciding the case, the Court of Appeals held that:

> [Though] Allowing the defendant to challenge Mrs. Eberle for cause certainly would have been reasonable and prudent under the circumstances before us. * * * However, in this limited circumstance, in view of the fact that the proposed FBI witnesses did not appear before the jury, coupled with Mrs. Eberle's response that she could be impartial, and viewing the overall voir dire, we are not prepared to say that the district court actually abused its discretion in denying the challenges for cause.

United States v. Apodaca, 666 F.2d 89, 94 (5th Cir. 1982); see also Appendix "A". The Petitioner petitioned for rehearing of this issue, *Petition for Panel Rehearing,* at pp. 2-9, but such petition was denied on February 17, 1982 (see Appendix "B").

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[4] Fifth Circuit precedents do not even require this showing in order to transform this sort of error into a reversible error. Mere deprivation of peremptory challenge would suffice. *Francone, et al. v. Southern Pac. Co.,* 145 F.2d 732 (5th Cir. 1944); *United States v. Nell,* 526 F.2d 1223 (5th Cir. 1976); *United States v. Boyd,* 446 F.2d 1267 (5th Cir. 1971).

REASONS WHY THE WRIT SHOULD BE GRANTED

I.

A JUROR WHO ADMITS THAT SHE WOULD TEND TO FAVOR THE GOVERNMENT IN A CLOSE CASE AND NEVER STATES THAT SHE COULD BE IMPARTIAL OR THAT SHE COULD SET HER BIAS ASIDE SHOULD BE EXCUSED FOR CAUSE.

This Court has previously dealt with several cases involving the bias of a potential juror for or against an institution. This Court has held:

> that Congress had not "undertaken to preclude the ascertainment of actual bias," and that the question in issue was limited to "implied bias, a bias attributable in law to the prospective juror regardless of actual partiality". * * * All the resources of appropriate judicial inquiry remain available in this instance as in others to ascertain whether a prospective juror, although not exempted from service, has any bias in fact which would prevent his serving as an impartial juror. In dealing with an employee of the Government, the court would properly be solicitous to discover whether, in view of the nature or circumstances of his employment, or of the relation of the particular governmental activity to the matters involved in the prosecution, or otherwise, he had actual bias, and, if he had, to disqualify him.

United States v. Frazier, 335 U.S. 497, 512-513, 93 L. Ed. 187 (1948); quoting and following *United States v. Wood*, 299 U.S. 123, 133, 81 L. Ed. 78 (1936). The reason why the Court considered these two cases on appeal or certiorari was because:

> In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *Re Oliver,* 333 U.S. 257, 92 L. Ed. 682, 68 S. Ct. 499; *Tumey v. Ohio,* 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 ALR 1243. "A fair trial in a fair tribunal is a basic requirement of due process." *Re Murchison,* 349 U.S. 133, 136, 96 L. Ed. 942, 946, 75 S. Ct. 623. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co Litt 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson v. Louisville,* 362 U.S. 199, 4 L. Ed. 2d 654, 80 S. Ct. 624. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies.

The right to a fair and impartial jury is not only enshrined in the Sixth Amendment, but is a fundamental concept without which a fair trial is seriously impeded from its very inception. The decision of the Fifth Circuit which holds that Juror Eberle's ambiguous and incomplete responses made after confessing her bias transforms her into an impartial juror is directly contrary to the decision of this Court in *Irvin v. Dowd,* 366 U.S. 717, 728, 81 S. Ct. 1639, 1645, 6 L. Ed. 751 (1961), where this Court specifically held that such statements should be given "little weight". The Fifth Circuit turned *Irvin* on its head by holding in effect that such statements outweighed even the actual confession of bias by the juror.

The Fifth Circuit below placed an impossible burden upon this Petitioner by ignoring the actual confession

of bias by the potential juror and by placing legally and factually unjustified weight on the juror's ambiguous comments to the effect that there was nothing wrong with her state of mind, that she had not decided as to guilt or innocence, and that she would not resent cross-examination of an FBI agent. The burden this approach places on the Defendant is to prove a juror's unfairness in every aspect of a case or else to lose his challenge under a dubious premise that a juror fair in some aspects is fair in all aspects, even against an actual confession of bias. The Fifth Circuit went so far as to elevate these ambiguous responses into the following statement attributed to the juror: "Mrs. Eberle's response that she could be impartial". *Apodaca*, 666 F.2d at 94.

First of all, Mrs. Eberle *never said that she was impartial or could be impartial* (see Appendix "C" infra). Indeed, when asked that specific question, Mrs. Eberle responded with an answer that indicated both her personal and institutional bias:

> THE COURT: *You mentioned your husband's career, so I might as well ask you about it now.*
>
> MRS. EBERLE: Yes.
>
> THE COURT: *Would that prevent you from being fair and impartial in this case?*
>
> MRS. EBERLE: I have thought about it a great deal, Your Honor. I am very proud of the 30 years he spent in the Bureau. I was also employed. I know the kind of investigation and the kind of work which is involved before any case is taken into a grand jury.
>
> I try to think of myself as being unbiased, but I will have to say this: If I were to hear evidence, which, all things being equal, had my brain in a whirl, I am very human, and I possibly might,

> knowing the work involved and the background of legal cases like this, I might be human enough to give a little more credence to the prosecution. I am just being honest with you.

(Emphasis supplied) (RVIII 114-115). What Mrs. Eberle is saying here is that in a situation where the evidence was close or even she would have to side with the government. After making this revelation, she was never asked if she could set this idea or preconception aside.[5]

Also, the Panel finds "that her frame of mind concerning the case was fair and impartial", *Apodaca,* slip opinion at 696. However, the actual record does not quite reveal this:

> MR. BURGESS: Well, I guess I'll have to ask you the hardest question that a defense lawyer ever has to ask a juror. If you were sitting where Mr. Apodaca is sitting, would you want a person in your frame of mind to pass judgment on your guilt or innocence?
>
> MRS. EBERLE: At this moment, I really do not believe there is anything wrong with my state of mind. I have tried to answer your questions as

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[5] Earlier, Mrs. Eberle did say she could set what she read in the newspapers aside in contrast to this preconception:

> THE COURT: If you did read anything or hear anything or if something pops into your mind and makes you remember that you read this, can you or can you not set that aside and not consider it and base your decision on the evidence presented?
>
> MRS. EBERLE: I could probably set it aside because my memory is not all that good.

This is hardly a statement that would apply to this later-revealed bias which dealt not with newspaper accounts but with the way she would judge evidence presented.

> honestly as I can. I am an FBI wife. My husband has not been active for 11 years; he is retired.

(RVIII 116).

First of all, we have the potential juror stating she does not consider that "there is anything wrong with [her] state of mind" without telling the court or counsel what that state of mind was except to refer to the previous "questions" (some of the answers to which had indicated bias). She even adds the proviso, "at this moment" which is entirely consistent with her indication of bias which would only come into play much later in the trial if the evidence was "equal" (Appendix "C"). This is certainly at best a "pallid" protestation of impartiality, *United States v. Nell*, 526 F.2d 1223, 1230 (5th Cir. 1976), which does not directly disavow her earlier admissions of bias:

> I try to think of myself as being unbiased, but I will have to say this: If I were to hear evidence, which, all things being equal, had my brain in a whirl, I am very human, and I possibly might, knowing the work involved and the background of legal cases like this, I might be human enough to give a little more credence to the prosecution. I am just being honest with you.

(RVIII 115).

Potential juror Eberle did say that she had not formed an opinion as to guilt or innocence and that she would not resent a harsh cross-examination of an FBI agent. However, these are only two aspects of impartiality and neither affects her previous admission that if the evidence was equal she would favor the government. What the Fifth Circuit held is that a juror is impartial under the law if:

1. The juror herself thinks that there is nothing wrong with her state of mind;
2. The juror has not arrived at a verdict before the beginning of trial; and
3. The juror would not resent cross-examination of government witnesses.

And this juror would still be considered impartial under these circumstances, even if:

1. The juror frankly admits that she would favor the government if the evidence was equal;
2. The juror background gives an objective confirmation of probable bias; and
3. The juror never states that she can set aside the bias or her background.

Mrs. Eberle's problem was in the area of applying the "beyond a reasonable doubt" standard which is the bedrock of our criminal justice system. If the evidence is "equal", then the defendant has won a victory. Actually, the government can produce more evidence than the defendant and still fall short of the reasonable doubt standard. Mrs. Eberle said she would side with the government if it matched the defendant's evidence and undoubtably would do the same if the government proved its case by a preponderance of the evidence. Indeed, it is in this aspect that our criminal justice conflicts with common perceptions of "impartiality" because the system places a heavy burden of proof against the government and reflects a presumption of innocence and a partiality toward the accused. Thus, accused was entitled to the partiality of reasonable doubt as against a juror who would side with the government if the government's evidence was equal or better.

II.

THE COURT OF APPEALS IMPROPERLY CONSIDERED THE FACT THAT THE FBI AGENTS DID NOT ACTUALLY TESTIFY WHEN SUCH FACT OCCURRED AFTER THE PETITIONER WAS FORCED TO EXHAUST HIS PEREMPTORY CHALLENGES.

The Fifth Circuit pointed out and emphasized in its original opinion that: "in view of the fact that the proposed FBI witnesses *did not appear before the jury*", *Apodaca,* 666 F.2d at 94. This fact is not legally or logically relevant to the question at hand. At the point of jury selection, the Appellant stood in this position:

1. The government proposed to call at least one FBI agent (see Appendix "C", *infra*), but did not limit itself in any way.
2. The Court denied the challenge for cause (RVIII 249).
3. The time had arrived for exercising peremptory challenges.[6]

Thus, defense counsel had to exercise his peremptory challenges at that moment and under those circumstances. Failure to utilize one of his peremptory challenges against Mrs. Eberle, would almost certainly have waived or seriously weakened any later complaints, *Mastrian v. McManus,* 554 F.2d 813, 818 (8th Cir. 1977); *Jordan v. United States,* 295 F.2d 355, 356 (10th Cir. 1961); see also *Graham v. United States,* 257 F.2d 724, 729 (6th Cir. 1958), and the cases cited therein.

---

[6] There is no provision in the Federal Rules of Criminal Procedure for deferring or reserving a peremptory challenge until the close of the evidence, or to exercise a conditional peremptory challenge.

The error defined by the Fifth Circuit in *Boyd, supra* and *Nell, supra* was as follows:

> [I]t was error for the court to deny Nell a challenge for cause. Since the effect of the court's action was to reduce the number of peremptory challenges allowed the defense, we have no choice but to reverse.

Nell, 526 F.2d at 1230.

The reversible error and harm occurred at the point when the government proposed calling at least one FBI agent and the Petitioner's counsel was required to exercise one of his peremptory challenges against Mrs. Eberle who should have been excused for cause; and this error and harm was not obviated one whit by the later decision of the Government to not call any FBI witnesses.[7] This is because the Petitioner had already been deprived of a peremptory challenge which would not be returned to him, which is the error, *Nell, supra*; *Boyd, supra.* Legally, defense counsel was entitled to take the Government at its word. Prudently, defense counsel could not afford to gamble that the Government would not call a witness it represented to the court it would call. Thus, legally and logically, the fact that the Government *later* decided not to call an FBI witness has no relevance to the error.

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[7] Of course, if the government had represented to the trial court that it would call *no* FBI witnesses and subsequently did not call any FBI witnesses, we would have a different situation.

CONCLUSION AND PRAYER

In summary, the Petitioner respectfully contends that the opinion of the Fifth Circuit is in error because of three reasons. First, the apparent view of the Court of Appeals that Mrs. Eberle affirmatively stated she could be impartial and could set aside her feeling for and bias in favor of the FBI appears to be based more on extrapolation of Mrs. Eberle's answers than what she actually said (see Appendix "C", *infra*). Secondly, even if this extrapolation is performed, Mrs. Eberle never retracts her statement which reflects that she would not afford the defendant the "partiality" of the "reasonable doubt" burden which our system demands. Thirdly, the Fifth Circuit seems to have placed an unjustified reliance on the fact that after proposing to call an FBI witness and forcing the defense to exercise a peremptory challenge, the Government thereafter did not call such witness which is irrelevant to the error complained of in this appeal. The Petitioner would suggest to this Panel that when the above facts are added to the conclusions already reached by the Fifth Circuit, it will be apparent that excusing Mrs. Eberle for cause was clearly required or, at the very least, a situation existed where the doubt "should have been resolved against permitting the juror to serve", *Nell* at 1230, cited and quoted, *Apodaca*, 666 F.2d at 94.

Wherefore, the above premises considered, the Petitioner prays that this Court grant a writ of certiorari to the United State Court of Appeals for the Fifth Circuit and thereafter reverse his conviction.

Respectfully submitted,

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Appendix

APPENDIX A

Publish

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1096

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR G. APODACA, JR.,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(January 4, 1982)

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.
TATE, Circuit Judge:

The defendant, Apodaca, appeals from his conviction for corporate income tax evasion and for making and subscribing materially false corporate income tax returns. Apodaca raises five issues on appeal: (a) that the jury selection process in the district does not represent a fair cross-section of the community; (b) that certain jurors should have been excused for cause; (c) that certain summary testimony should not have been admitted; (d) that a judgment of acquittal was erroneously denied on

one count; and (e) that the prosecutor made improper closing remarks. For the reasons set forth below, we affirm Apodaca's conviction.

Victor Apodaca was charged in August 1980 with a ten-count indictment[1] for income tax evasion. The government's motion to dismiss Count Ten was granted;[2] the jury returned a verdict of not guilty on the three counts of personal income tax fraud;[3] and the jury returned a verdict of guilty on the three counts of corporate income tax evasion (26 U.S.C. § 7201)[4] and the three counts of willfully making and subscribing materially false corporate income tax returns (26 U.S.C. § 7206(1).[5] After the jury returned a verdict of guilty, the district court sentenced the defendant to three years on each of the six counts, to be served concurrently on all counts except Count Three, and imposed two consecutive fines of $10,000 each for Counts One and

---

[1] *Counts One through Three:* Willfully attempting to evade the corporate taxes of Victor Apodaca Enterprises, Inc., for the fiscal years ending February 29, 1976, February 28, 1977, and February 28, 1978 [26 U.S.C. § 7201].

Counts Four through Six: Willfully making and subscribing materially false corporate income tax returns for Victor Apodaca Enterprises, Inc., for the same three years [26 U.S.C. § 7206(1)].

Counts Seven through Nine: Willfully making and subscribing materially false joint personal income tax returns for the respective calendar years 1975, 1976, and 1977 [26 U.S.C. § 2706(1)].

Count Ten: Knowingly presenting to the Treasury Department of the United States a false claim for refund [18 U.S.C. § 287].

[2] Count Ten, see note 1, *supra.*

[3] Count Seven-Nine, see note 1, *supra.*

[4] Count One-Three, see note 1, *supra.*

[5] Count Four-Six, see note 1, *supra.*

Two. On Count Three, the district court then suspended the execution of the consecutive sentence on five years probation and imposed a $10,000 fine. It is from this conviction that Apodaca appeals.

A. Jury Selection Process

Apodaca contends on appeal that the jury selection process in the El Paso Division of the Western District of Texas is unlawful. He makes the argument that the selection process violates both the Sixth Amendment right to an impartial jury and the statutory requirements under 28 U.S.C. § 1861-1874, designed to assure random selection from a fair cross-section of the community. As one basis of this complaint, Apodaca alleges that there is a significant underrepresentation of Hispanic surnamed individuals on the Master Jury List, due to the fact that the sole source of the jury list is the voter registration list and Hispanic-Americans traditionally register to vote in fewer numbers than other recognizable groups. This contention was answered adversely to Apodaca in United States v. Brummitt (No. 81-1067), ___ F.2d ___, ___ (5th Cir. 1981) (slip opinion p. ___, Dec. ___, 1981), a companion case decided by the court this term.[6]

Apodaca claims that his argument may be distinguished from that in *Brummitt* in that additionally he claims a disparity in the number of young people (i.e., persons in

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[6] The statistical evidence in the present case is similar, but not identical, to that presented in U.S. v. Brummitt (No. 81-1067), slip op. at p. ___, due to the adjustment figure and random sampling method used by the expert witnesses in the present case. See text and note 8, *infra*.

the 18 to 35 years old age group on the jury lists).[7] He alleges that the combination of these two issues produces a greater violation of the requirement that grand and petit juries be representative of a cross-section of the community. 28 U.S.C. §§ 1861, 1862.

Apodaca introduced evidence by affidavit and at the hearing on his motion to dismiss the indictment that, according to the 1970 census, 53.2% of the gross general population of El Paso County were in the category of "Spanish" surname and language,"[8] while only 42.3% of his sampling of 500 names taken from the qualified jury wheel had Hispanic surnames. Additional testimony was elicited to the effect that certain minorities (including Hispanics) are believed to have been undercounted on the census and that a figure of 6.9% should be added to the 53.2% that appears in the actual census figures. Using such statistics, the absolute disparity of Hispanics on grand and petit juries in El Paso County is alleged to be 17.8% (53.2% + 6.9% (correction %) - 42.3% = 17.8%). Apodaca then argues that this disparity

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[7] In his motion to dismiss the indictment, the defendant alleged underrepresentation of Hispanics, young people and women. In the order overruling the motion (R III, 598; R. Ex.), the district court stated that the defendant's claim with respect to the underrepresentation of women was withdrawn and was not before the court. The defendant, while arguing on appeal the underrepresentation of women, did not contest the district court's failure to rule on this point; therefore, we consider only the defendant's argument relative to Hispanics and young people.

[8] Sperlich testified that he relied on the 1970 census (with a correction factor of 6.9%) and the jury wheel of the El Paso Division. He randomly selected an overall sample of 500 names from the qualified jury wheel and statistically estimated a percentage of Hispanic surnamed and young people in the master jury wheel.

results from the fact that the jury wheel is taken exclusively from the voter registration list and that Hispanic Americans traditionally register to vote in fewer numbers. Accordingly, Apodaca argues that under the situation he presents, 28 U.S.C. § 1863(b)(2)[9] would require that supplemental lists be used as a source for the master jury list.

The statistics presented to the district court concerning the underrepresentation of young people are similar. Evidence was introduced by affidavit and at the hearing that the general population of El Paso County contains 46.8% of persons age 18–35, while the 500 person sample drawn from the jury list contained only 28.2%, or an absolute disparity of 18.6%.[10]

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[9] 28 U.S.C. § 1863(b). Among other things, such plan shall—

* * *

(2) specify whether the names of prospective jurors shall be selected from the voter registration lists or the lists of actual voters of the political subdivisions within the district or division. The plan shall prescribe some other source or sources of names in addition to voter lists where necessary to foster the policy and protect the rights secured by sections 1861 and 1862 of this title. The plan for the District of Columbia may require the names of prospective jurors to be selected from the city directory rather than from voter lists. The plans for the districts of Puerto Rico and the Canal Zone may prescribe some other source or sources of names of prospective jurors in lieu of voter lists, the use of which shall be consistent with the policies declared and rights secured by sections 1861 and 1862 of this title.

[10] Additionally, the affidavits indicated that in the 18–30 year old group, the general population test group contained 37.9% and the sample contained 21.0% (or a 16.9% absolute disparity); that in the 18–25 year old group, the general population test group contained 24.1% and the sample contained 12.4% (or a 11.7% absolute disparity) (R I. 189–190).

The claims raised by Apodaca are essentially the same as in United States v. Brummitt, *supra*; ___F.2d at ___ (slip opinion p. at ___, Dec. ___, 1981), which involved challenges to the El Paso County jury selection process only on the basis of an underrepresentation of Hispanics. As in *Brummitt*, the defendant here alleges that section 1863(b)(2) of the Jury Selection and Service Act of 1968 (28 U.S.C. § 1861 et seq.) has been violated by the exclusive use of the voter's registration list. As in *Brummitt*, the defendant here presented only evidence that tended to establish that there is a disparity between the proportion of Hispanic-Americans and young people in the *gross* general population and the proportion of those selected on the master jury list. The record is totally devoid of any evidence that would tend to establish the percentage in either identifiable class who are *eligible* to serve as jurors.

For the reasons fully discussed in United States v. Brummitt, *supra*, ___ F.2d at ___ (slip opinion p. ___, Dec. ___, 1981), find that, on the record before us, Apodaca has failed to establish a prima facie case of substantial non-compliance with the statutory or constitutional requirements.[11] We, therefore, affirm the denial of Apodaca's motion to dismiss the indictment.

B. Juror Challenge for Cause

As his second point of error, Apodaca contends that the trial court erred in refusing to excuse for cause two jurors. Both prospective jurors were subsequently

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[11] We reiterate, as we stated in U.S. v. Brummitt (No. 81-1067), n.10 (slip opinion at p. ___, Dec. ___, 1981), that when a prima facie case of jury discrimination is established, supplementation of the voter list with "some other source or sources of names in addition to voter lists" is mandatory. 28 U.S.C. § 1863(b)(2).

struck by the defendant, using up his peremptory challenges (an action which Apodaca alleges caused him to be unable to peremptorily challenge two jurors who were unacceptable).

During the general voir dire the district court asked for a show of hands of prospective jurors who had some exposure to pre-trial publicity.[12] Mrs. Jean Eberle, having indicated that she had heard of the case in the newspaper was questioned individually by the court. During this examination, juror Eberle brought out the following points on which the defendant based his challenge for cause: (1) that she had worked for the FBI; (2) that her husband (now retired) had worked for the FBI 30 years; (3) that she "knew how much investigation went into a case before presentment to a grand jury," and (4) that if all things were equal, she might be human enough to give a little more credence to the prosecution based on this knowledge.

The district court and the defense counsel then questioned Mrs. Eberle concerning specific things she may have read about the case and her ability to remain impartial in light of the fact that the case had been initiated and prepared by the FBI. During the voir dire Eberle responded that she had not discussed the case with her husband and was not cognizant of much concerning the case. She answered, responding to the court's inquiry, that she could set aside anything she remembered and base her decision on the evidence presented. Mrs. Eberle responded that she would not resent any stringent cross-examination of FBI witnesses, that her frame

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[12] Defendant requested permission to examine jurors individually upon voir dire due to pre-trial publicity. (See Doc. 14) (separate folder).

of mind concerning the case was fair and impartial, and that she did not know either of the proposed FBI agent witnesses.

The defendant strongly contends that juror Eberle, while honest with the court concerning her assertions that she would rely on the evidence, was not asked specifically if she could set aside her stated tendency to favor the prosecution in this case, based on her prior association with the FBI. Apodaca argues that as she openly admitted her prejudice the court need not merely suspect bias, but had clear evidence of it. Relying on United States v. Corey, 625 F.2d 704 (5th Cir. 1980), *cert. denied*, 450 U.S. 925, 101 S. Ct. 1377 (1981), and United States v. Nell, 526 F.2d 1223 (5th Cir. 1976), the defendant claims that even if Eberle's responses did not absolutely establish her bias in the eyes of the court (as he argues it did in this case), a substantial doubt concerning actual prejudice was raised, and any such doubt "should be resolved against permitting the juror to serve, unless the prospective panelist's protestation of a purge of preconception is positive, not pallid." *Nell, supra*, 526 F.2d at 1230. Apodaca urges on appeal that juror Eberle's responses were noncommittal at best, but could not be considered "positive."

The Sixth Amendment entitles a defendant to an impartial jury which will render a verdict based exclusively upon the evidence presented in court and not on outside sources. Irvin v. Dowd, 366 U.S. 717, 711-23, 81 S. Ct. 1639, 1642-43 (1961). This right is principally implemented through the system of challenges exercised during the voir dire of prospective jurors. *Nell, supra*, 526 F.2d at 1229. The judge has broad discretion in the conduct of the voir dire, subject to the essential demands of fairness that require that prejudice would

be discovered if present. *Corey, supra,* 625 F.2d at 707; *Nell, supra,* 526 F.2d at 1229. If "actual prejudice" is shown, the court must grant a challenge for cause. *Corey, supra,* 625 F.2d at 707; *Nell, supra,* 526 F.2d at 1229. The determination as to the impartiality of a juror generally is committed to the discretion of the trial judge and will not be reversed absent an abuse of his discretion. United States v. Salinas, 654 F.2d 319, 328 (5th Cir. 1981); United States v. Martinez, 604 F.2d 361, 364 (5th Cir. 1979), *cert. denied,* 444 U.S. 1034, 100 S. Ct. 708 (1980).

Allowing the defendant to challenge Mrs. Eberle for cause certainly would have been reasonable and prudent under the circumstances before us. This court recognizes that some place along the line we must know, no matter what a witness says, that he or she has an institutional bias he cannot overcome. However, in this limited circumstance, in view of the fact that the proposed FBI witnesses *did not appear in the case,* coupled with Mrs. Eberle's response that she could be impartial,[13] and viewing the overall voir dire, we are not prepared to say that the district court actually abused its discretion in denying the challenges for cause.

Additionally, Apodaca challenged juror Stonecipher for cause. Mr. Stonecipher, an accountant, qualified to practice before the IRS, responded that he would be inclined to measure any testimony about certain tax concepts against his own expertise, that he considered himself competent to interpret the Internal Revenue Code and regulations, and that it might take more

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[13] We recognize that self-serving statements of impartiality must often be given little weight. Irvin v. Dowd, 366 U.S. 717, 728, 81 S. Ct. 1639, 1645 (1961).

evidence than with a layman to overcome his own beliefs about the interpretation.

Apodaca argues that this testimony was evidence which establishes an "actual bias," requiring the court to grant a challenge for cause. However, in the remainder of his examination, Stonecipher answered that he had no opinion on the guilt or innocence of the defendant, that he did not believe the IRS's interpretation of the revenue code is necessarily correct, that the defendant is innocent until proven guilty and has no burden of proof, that he could render a decision based on the evidence produced at trial, and that he could follow the judge's instructions as to the law. As with juror Eberle, on the "overall examination" of the prospective juror, *Corey, supra,* 625 F.2d at 708, we do not find that the trial court abused its broad discretion.

C. Summary Witness Hughes

Apodaca asserts that the trial court erred in allowing the introduction of certain summary charts into evidence.

Special Agent Hughes, the chief IRS agent in charge of this prosecution, testified as a summary witness for the government concerning computations for deciding proper deductions, taxable income and taxes owing thereon. Hughes used summary charts, which included computations based on previous testimony and documents admitted into evidence.

The defendant objects to the use of certain summary charts (designated as Exhibits 119, 120, 121, 123, 124) on the ground that the charts were not prepared by Hughes and were inaccurate and misleading.

Hughes testified concerning a computation of profits of Victor Apodaca Enterprises, Inc. for the year under

question, Exhibit 123. Hughes testified that while the chart was prepared under his direction, he had not done the computations personally. The defendant objected to the introduction of this chart into evidence as unreliable hearsay not subject to proper cross-examination because the person who did the actual computations was not on the stand. The court sustained the defense objection to the chart but allowed Hughes to be questioned on the computations as having been adopted as his own.

Three additional charts (Exhibits 119, 120, and 121)[14] were admitted into evidence without any specific objection by the defendant. The only objection offered was "the one previously made" to Exhibit 123 that the computations were not made by Hughes personally. The court allowed the introduction of all three exhibits with the reservation that the defendant's objection applied to only one of the charts (Exhibit 121). The last chart at issue, Exhibit 124,[15] was admitted without any objection.

The defendant's argument then tends to apply only to Exhibit 121, a summary of what the government alleged to be the personal unreported income of Apodaca for the particular years in question.

While we recognize the problems associated with permitting the presentation of a summary of the evidence in a criminal case. *See* United States v. Scales, 594 F.2d 558 (6th Cir.), *cert. denied*, 441 U.S. 946, 99 S. Ct. 2168 (1979); Flemister v. United States, 260 F.2d 513,

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[14] Exhibits 119 and 120 concern gross receipts and expenses for Victor Apodaca Enterprises, Inc. Exhibit 121 concerned Apodaca's personal expenses.

[15] Exhibit 124 concerned taxable income for the corporation.

517 (5th Cir. 1958); Lloyd v. United States, 226 F.2d 9 (5th Cir. 1955); Steele v. United States, 222 F.2d 628, 630 (5th Cir. 1975),[16] we cannot find, on the record before us, that the introduction of this exhibit was reversible error. The record does not clearly reflect whether or not Hughes was assisted on Exhibit 121 (as he stated he *had* been with Ex. 123, which was not admitted into evidence); the defendant was acquitted on all charges related to his personal income tax returns;[17] and considering the record, as a whole, we are convinced that there was no reasonable possibility that any error in admitting Exhibit 121 contributed to Apodaca's conviction. Fahy v. Connecticut, 375 U.S. 85, 86-87, 84 S. Ct. 229, 230 (1963); Null v. Wainwright, 508 F.2d 340, 343 (5th Cir.), *cert. denied*, 421 U.S. 970, 95 S. Ct. 1964 (1975). Additionally, the defendant was allowed to fully cross-examine the witness, in front of the jury, concerning any errors and inconsistencies in the computations and testimony. The jury was plainly able to see and weigh any mistakes made.

D. Erroneous Denial of Acquittal on Count III

The jury returned a verdict of guilty for willfully attempting to evade the corporate taxes (26 U.S.C. § 7201) of Victor Apodaca Enterprises, Inc., for the fiscal years ending February 29, 1976, February 28, 1977, and February 28, 1978. Apodaca was sentenced to three years imprisonment on each count, to be served concurrently. As to Count III, the district court sus-

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[16] A witness's attempt to evaluate the evidence enables the government to invade the province of the jury. Steele v. U.S., 222 F.2d at 630.

[17] See note 1, *supra*, Counts 7-9.

pended execution of the prison sentence on five years probation and imposed a $10,000 fine. The indictment charged that the taxable income of the corporation for this fiscal year was substantially in excess of the $32,519.00 reported.

Apodaca asserts that his motion for a judgment of acquittal on Count III should have been granted because there was no tax owing for that year as there were additional deductions available to the company. In particular, the defendant claims that the corporation borrowed approximately $110,000 during the fiscal years ending February 28, 1977 and 1978 to pay bond forfeitures for which that corporation was liable. Consequently, he claims a business deduction for the *entire amount* for the year in which the funds were borrowed. The government, while not challenging the validity of the deductions argues that these bond forfeitures were deductible only to the extent of the payments *actually made* on the loans during the applicable fiscal year.

The corporation's status as a "cash basis"[18] taxpayer is undisputed. As such, Apodaca claims entitlement to a deduction for ordinary and necessary business expenses when paid,[19] although paid with borrowed funds. Crain v. Commissioner of Internal Revenue, 75 F.2d 962, 964 (8th Cir. 1935). According to the testimony of the accountant who prepared the 1978 return the deductions were not correctly calculated (deductions to the extent of actual payments to the surety were claimed on the return) but the total amount paid by the surety company to the court must now be recognized under the

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[18] Internal Revenue Code § 446(c)(1), 26 U.S.C. § 446(c)(1).

[19] Treasury Reg. § 1.461-1(a), 26 C.F.R. § 1.461-1(a).

correct accounting method as clearly deductible business expenses *paid* by Apodaca during fiscal year 1978. (Blue brief, Appendix E & F).

The defendant concedes that the facts are uncontested and that the allowance or disallowance of this deduction is a question of law. Victor Apodaca Enterprises, Inc. contracted with Surety Insurance Company to secure payment of bond forfeitures making Surety primarily liable to the court for the posted bond. Caldwell v. Stevenson, 567 S.W.2d 278 (Tex. Civ. App.—Austin 1978, no writ). When Surety paid the bond forfeitures in question it was paying an obligation under the contract; the funds were not advanced as a loan to Apodaca. See Zoby v. United States, 364 F.2d 216 (4th Cir. 1966).

Consequently, the corporation is only entitled to a deduction for the payments *actually made to the surety* during the fiscal year ending February 28, 1978.

E. Improper Closing Argument by the Government

Finally, Apodaca complains that the district court erroneously denied his motion for a new trial based on improper prosecutorial closing arguments. Specifically, the defendant argues that the government commented on his personal tax returns for the years in question despite the fact that earlier in the trial the court had sustained a government motion to exclude any evidence of the defendant's actual personal tax liability for those particular years as irrelevant.

Apodaca had sought to introduce, on the issue of willfulness and intent, evidence that he would have owed no personal taxes. The government's objection to this evidence was sustained. Consequently, the defendant

objected to the government's reference to the personal tax returns in its closing argument. The trial court sustained this objection and instructed the jury to disregard any remarks directed to that subject.

While we will not condone the prosecutor's attempt to argue information which it had expressly denied the defendant an opportunity to develop, in view of the trial court's curative instruction to disregard, we find that this was harmless error.[20] United States v. Georgalis, 631 F.2d 1199, 1203 (5th Cir. 1980) (correcting instruction curing impermissible questioning); United States v. Wilkinson, 601 F.2d 791, 797 (5th Cir. 1979).

For the reasons stated above, we find no merit in the points of error raised by the defendant in this appeal, and, therefore, AFFIRM Apodaca's conviction.

AFFIRMED.

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[20] We note also that the jury acquitted Apodaca on all charges related to his personal income tax returns (Counts 7-9). See note 1, *supra*.

APPENDIX B

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-1096

[Filed: Feb. 17, 1982]

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VICTOR G. APODACA, JR.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ON PETITION FOR REHEARING

(February 17, 1982)

Before THORNBERRY, TATE and WILLIAMS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

Clerk's Note: See Rule 41 FRAP and Local Rule 17 for stay of the mandate.

APPENDIX C

COMPLETE VOIR DIRE EXAMINATION OF POTENTIAL JUROR EBERLE

* * *

(Mr. Etheridge then departed the room. Whereupon, Mrs. Jean Eberle entered the room and the following occurred:)

THE COURT: You are Mrs. Jean Eberle, is that right?

MRS. EBERLE: Yes, Your Honor.

THE COURT: Mrs. Eberle, I think you probably raised your hand, when the question was asked, "Have you ever heard anything about this case?" From what source came your information, newspaper, radio—

MRS. EBERLE: Newspaper, basically.

THE COURT: Which newspaper? Do you remember?

MRS. EBERLE: The El Paso Times yesterday morning. I had read last week that the jury would be picked today for this case, but frankly, I scanned the paper yesterday morning. I wasn't particularly—I really didn't think I should read it completely.

THE COURT: Did you read it in detail or—

MRS. EBERLE: Not in detail, no, sir, I did not.

THE COURT: Do you remember any specific statements from the article?

MRS. EBERLE: No, Your Honor, I don't remember any.

THE COURT: Do you recall reading other articles over a period of time besides that one?

MRS. EBERLE: Yes, just vaguely. Frankly, there are just certain things in the paper that I am particularly

interested in. I think you are all aware that my husband was an FBI agent for 30 years. Perhaps I would pay more detailed attention to a case that involved the Bureau.

So, other than the fact that I have heard the name "Apodaca" and so forth, I am really not cognizant of too much about the case. Nor have I discussed it with my husband.

THE COURT: Do you recall at this time any radio or television publicity about it?

MRS. EBERLE: No, sir.

THE COURT: Do you have an opinion about whether the man is guilty or not guilty?

MRS. EBERLE: No, sir, I do not have an opinion.

THE COURT: You seem to be very sincere when you say that.

MRS. EBERLE: I am. I am.

THE COURT: If you did read anything or hear anything or if something pops into your mind and makes you remember that you read this, can you or can you not set that aside and not consider it and base your decision on the evidence presented?

MRS. EBERLE: I could probably set it aside because my memory is not all that good.

THE COURT: You mentioned your husband's career, so I might as well ask you about it now.

MRS. EBERLE: Yes.

THE COURT: Would that prevent you from being fair and impartial in this case?

MRS. EBERLE: I have thought about it a great deal, Your Honor. I am very proud of the 30 years he spent

in the Bureau. I was also employed. I know the kind of investigation and the kind of work, which is involved, before any case is taken into a grand jury.

I try to think of myself as being unbiased, but I will have to say this: If I were to hear evidence, which, all things being equal, had my brain in a whirl, I am very human, and I possibly might, knowing the work involved and the background of legal cases like this, I might be human enough to give a little more credence to the prosecution. I am just being honest with you.

THE COURT: Does the government have any questions?

MR. SPECK: The government has no questions.

MR. BURGESS: I appreciate your candor.

MRS. EBERLE: Thank you, Mr. Burgess.

MR. BURGESS: Obviously, we are all human.

MRS. EBERLE: Certainly.

MR. BURGESS: The real question is this: There is going to be an FBI agent witness in all reasonable probability.

MRS. EBERLE: Yes.

MR. BURGESS: Life being what it is, I am probably going to have to cross-examine that witness.

MRS. EBERLE: Yes.

MR. BURGESS: And it may not be a totally pleasant experience for anybody. Let's assume that witness testifies to something and he is cross-examined rather harshly, would you, as a former employee and wife of an officer with a good record for 30 years, would you be inclined really to just kind of resent that a little bit?

MRS. EBERLE: No, sir, I wouldn't.

MR. BURGESS: When it came down to a close call on the jury, let's assume that the FBI agent has testified to

X, and a defense witness, who was not a law enforcement officer, testified directly the opposite. If it was a close call, would you be more inclined to believe the testimony of the FBI agent?

MRS. EBERLE: Mr. Burgess, I think, again being human that I would have listened to the defense witness and I believe that I might, in some way, have made a judgment as to whether or not I thought he was telling the truth.

Again, all things being equal, if my mind—you know, I would have to make my own mind up one way or the other, so it could be, but again—

MR. BURGESS: Well, I guess I'll have to ask you the hardest question that a defense lawyer ever has to ask a juror. If you were sitting where Mr. Apodaca is sitting, would you want a person in your frame of mind to pass judgment on your guilt or innocence?

MRS. EBERLE: At this moment, I really do not believe there is anything wrong with my state of mind. I have tried to answer your questions as honestly as I can. I am an FBI wife. My husband has not been active for 11 years; he is retired.

MR. BURGESS: You were an employee of the Bureau?

MRS. EBERLE: Here.

MR. BURGESS: Was that during Hoover's administration?

MRS. EBERLE: Oh, yes. That was back in 1942, 1943 and 1944.

MR. NAMORATO: Is your husband a member of the Retired FBI Agent's Association?

MRS. EBERLE: Yes, he is.

MR. NAMORATO: Is he active in that association?

MRS. EBERLE: He goes to the local meetings and he has been to three of the national conventions.

MR. NAMORATO: Thank you.

MR. BURGESS: In that context and at those meetings, have you ever socially known Mr. Alaniz or Mr. Tosti of the FBI?

MRS. EBERLE: Mr. Tosti or Mr. Alaniz? No, sir.

MR. BOYD: For the record, Mr. Alaniz is an IRS agent and Mr. Tosti is an FBI agent, formerly here and now in Cleveland, Ohio.

MRS. EBERLE: Mr. Boyd, we've been gone from here since—we left here 21 years ago and went to San Francisco.

MR. BURGESS: Good judgment, but you came back.

MRS. EBERLE: We came back, which was even better.

THE COURT: Any more questions for Mrs. Eberle?

MR. BURGESS: I have no more questions.

THE COURT: You may step out of the room now.

MRS. EBERLE: Thank you.

(Mrs. Eberle departed from the room.)

MR. BURGESS: May it please the Court, not on the question of publicity, but on the question of what she calls a "natural human tendency", I think this juror falls within the same category essentially as potential juror Gipson, with one exception. I am not sure juror Gipson was as candid and forthcoming as Mrs. Eberle, but I would like to state on the record that there are substantial grounds to believe that this juror is a close call, as she said, would be and might very understandably be persuaded to be favorably inclined towards the government's case, simply because of her own employment

with the Bureau and her husband's obvious record, which she is very proud of.

It's the kind of juror that I just don't think we should have to cross-examine an FBI agent with her sitting in judgment.

THE COURT: Government?

MR. SPECK: Lou Tosti is going to be a witness only depending upon some of the stipulation. We may have to bring him in just to introduce some evidence, some records. I don't think there will be any substantive testimony from him. I think that the juror is all right. I think she answered the questions properly and we would object to her discharge.

MR. BURGESS: I am particularly concerned about her reference to the amount of work that goes into an investigation prior to its presentation to the grand jury. And I feel that that comment in and for itself would be pretty good grounds for a challenge for cause.

THE COURT: I am going to set this aside for the moment and reserve ruling on your challenge for cause.

Bring the next juror.

(RVIII 112-119)

Opposition

Office - Supreme Court, U.S.
FILED
JUN 10 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1936

In the Supreme Court of the United States

OCTOBER TERM, 1981

VICTOR G. APODACA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1936

VICTOR G. APODACA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the trial court's refusal to excuse a prospective juror for cause was an abuse of discretion that had the effect of depriving him of one of his peremptory challenges.

1. Following a jury trial in the United States District Court for the Western District of Texas, petitioner was convicted of (1) willfully attempting to evade the corporate taxes of Victor Apodaca Enterprises, Inc., for fiscal years ending February 29, 1976, February 28, 1977, and February 28, 1978, in violation of 26 U.S.C. 7201, and (2) willfully subscribing false corporate tax returns for the same fiscal years, in violation of 26 U.S.C. 7206(1). He was fined a total of $30,000 and sentenced to three years' imprisonment and a consecutive term of five years' probation. The court of appeals affirmed (Pet. App. 1a-15a).

During the *voir dire* examination, one of the prospective jurors, Jean Eberle, revealed (Pet. App. 19a, 21a) that her husband had been an FBI agent for 30 years before he retired 11 years ago. Eberle also said (*id.* at 21a) that she had been employed by the FBI about 40 years ago. When asked whether her husband's former employment would prevent her from being fair and impartial (Pet. App. 19a-20a), Eberle responded that "all things being equal" she "might * * * give a little more credence to the prosecution" because she knew the amount of "work involved and the background of legal cases like this."

Petitioner challenged Eberle for cause (Pet. App. 22a-23a). The trial judge rejected the challenge (Tr. 249, 250), and petitioner used one of his peremptory challenges to eliminate her from the panel (Pet. 5).

2. There is no claim that any of the petit jurors who were empaneled in this case were biased or that the *voir dire* was inadequate to uncover any potential bias.[1] Petitioner's only submission in this Court is that the failure to excuse Eberle for cause was an abuse of discretion. That question is plainly not one requiring resolution by this Court. Moreover, the decision of the court of appeals is correct.

A trial judge's conduct of *voir dire* and his conclusions as to impartiality rest in large measure upon his evaluation of the prospective juror's demeanor and responses to questions. See, *e.g.*, *Rosales-Lopez* v. *United States*, 451 U.S.

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[1]Petitioner notes (Pet. 6-7) that in the court of appeals he argued that two of the petit jurors, Williams and Landin, had been "unacceptable." Although petitioner does not pursue the point in this Court, it should be noted that petitioner raised no objection to either of these jurors in the trial court (Tr. 101-105, 216-221) and declined the court's invitation to question Landin during *voir dire*. Indeed, none of the jurors finally selected to serve in this case (Tr. 348), including the two alternates, had been challenged for cause by petitioner (see Tr. 105, 107, 127, 157, 195, 221, 230, 235, 249, 268, 273, 278, 313, 340).

182, 188 (1981). An appellate court cannot easily "second-guess the conclusions" of the trial judge in these matters, and he is therefore afforded broad discretion. *Id.* at 188-189; see also *Frazier* v. *United States*, 335 U.S. 497, 511-512 (1948). In light of Eberle's statement that she "might" under some circumstances be inclined to give a "little more credence to the prosecution" because of her knowledge of the work involved in preparing a case, the court of appeals acknowledged (Pet. App. 9a) that it would have been "reasonable and prudent" to excuse her. Nevertheless, the court of appeals correctly concluded that refusal to excuse her for cause did not constitute an abuse of discretion under the circumstances of this case. Eberle flatly disavowed (Pet. App. 19a) any opinion as to petitioner's guilt, a disavowal that the trial court deemed (*ibid.*) "very sincere." Eberle also indicated (Pet. App. 21a) that she would be content to have a person with her frame of mind sit on the jury if she were the defendant. Furthermore, Eberle had not worked for the FBI for nearly 40 years and her husband had been retired for 11 years. Contrary to petitioner's apparent contention (Pet. 13), Eberle's statement does not indicate that these remote employment relationships would have caused her to disregard or be unable to follow the trial judge's instructions on the government's burden of proof. Cf. *United States* v. *Wooton*, 518 F. 2d 943 (3d Cir.), cert. denied, 423 U.S. 895 (1975).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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